

**Ezell v Gallucci**

2020 NY Slip Op 34648(U)

May 4, 2020

Supreme Court, Rockland County

Docket Number: Index No. 35404/2018

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

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CURTIS EZELL,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 35404/2018

SAMUEL J. GALLUCCI, and  
COUNTYWIDE CARTING, LTD.,

Motion Sequence #2

Defendants.

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The following papers, numbered 1 to 6, were read on plaintiff, Curtis Ezell’s (hereinafter “plaintiff”), motion for an order pursuant to CPLR §3212 granting summary judgment in favor of plaintiff on the issue of liability:

Notice of Motion/Affirmation in Support/Affidavit in Support/Exhibits (1-6).....	1-3
Affirmation in Opposition/Affidavit in Opposition/Exhibits (A-H) .....	4-5
Affirmation in Reply .....	6

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This personal injury action arises out of a two-vehicle motor vehicle accident which occurred on June 29, 2016, on Interstate 87 in the County of Rockland, Town of Ramapo, and State of New York.

The Parties’ Claims

Plaintiff submits that the motor vehicle accident occurred on Interstate 87 in the County of Rockland, Town of Ramapo, and State of New York, in the southbound right-hand lane. At the location of the accident the highway has five lanes across, three southbound and two northbound. Plaintiff states that immediately before the accident, he was driving his vehicle at or below the speed limit.

Before the accident, plaintiff states he was traveling in the center lane of the three southbound lanes when he became aware of defendants’ vehicle behind him traveling at a high rate of speed in the same lane. As a result, plaintiff signaled right and moved into the right-hand lane. Approximately fifteen seconds later, a collision occurred between the driver’s side rear quarter panel of the

plaintiff's vehicle and the front of the defendants' vehicle. Plaintiff states that immediately before the accident he did not stop suddenly or slow down. Nor did he hear horns or the screeching of tires or brakes. On the date and time of the accident it was daylight and visibility was good. The weather was cloudy, but clear and the road was dry.

Plaintiff asserts that as a result of the responding police officer's investigation of the accident, the defendant-driver, Samuel J. Gallucci (hereinafter "Gallucci"), was issued Vehicle and Traffic Law violation/citation for an unsafe lane change pursuant to VTL §1128(a). Plaintiff notes that thereafter, Gallucci plead not guilty to the violation, but was found guilty after a trial in the Justice Court of the Town of Ramapo. Plaintiff relies on both the police report (NYSCEF Doc. No. 22) and the guilty verdict on the traffic ticket in establishing defendants' liability for negligence in this action (NYSCEF Doc. 27).

The defendants, Samuel J. Gallucci, and Countywide Carting, Ltd., oppose the motion. On their behalf, counsel for defendants argued that plaintiff's motion should be denied. Defense counsel submits that plaintiff has failed to make a *prima facie* showing of entitlement to summary judgment as there remain triable issues of fact regarding Gallucci's alleged violation of Vehicle and Traffic Law §1128(a). Further, counsel argues that plaintiff's inclusion of a police accident report in support of his position that Gallucci violated Vehicle and Traffic Law §1128(a) is inadmissible, and that Gallucci's conviction of a traffic infraction is inadmissible in this case.

In his affidavit in opposition to the motion, Gallucci stated that on June 29, 2016, he was employed as a driver with Countywide Carting, Ltd. He was traveling in the middle lane on Interstate 87 in the County of Rockland in the Town of Ramapo, when he noticed a vehicle in front of him entering the right lane. He observed the car successfully enter the right lane.

Gallucci stated that as he approached the vehicle to his right, he was traveling at approximately the 65 mile per hour speed limit, and was starting to pass the vehicle in the right lane. While Gallucci was passing the vehicle in the right lane, he stated he heard a noise as if the vehicle's tire exploded. He then stated, somewhat cryptically, "I believe that this caused the other vehicle to swerve into the middle lane, forcing the vehicle to re-enter the middle lane and hit the side of the truck. This forced the other vehicle to swing in front of my truck and caused the truck to push the vehicle up the highway" (NYSCEF Doc. No 31). Gallucci stated that at no time did he attempt to change from the middle to the right lane.

Legal Analysis/Discussion

A party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of some material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Summary judgment should be granted without hesitation in actions where there is no meritorious cause of action (*Lomnitz v Town of Woodbury*, 81 AD2d 828, 829 [2d Dept 1981]).

A motion for summary judgment should be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]). The purpose of a summary judgment motion is to "expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

In searching the record for an issue of fact, the Court is not obligated to ferret out speculative issues in order to force the matter to trial in the hopes that the trial may disclose something that pre-trial proceedings did not (*Andre v Pomeroy*, 35 NY2d at 364). The issues of fact must be bona fide issues raised by evidentiary facts (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). "Mere surmise, suspicion and accusation are insufficient to defeat summary judgment" (*Holy Spirit Ass'n for Unification of World Christianity v Harper and Row, Publishers, Inc.*, 101 Misc.2d 30, 35 [Sup. Ct. New York Cty. 1979]).

Here, plaintiff's motion for summary judgment is denied. Plaintiff has failed to establish a prima facie claim of negligence against defendants. Not only do the parties' affidavits provide conflicting versions of the accident, plaintiff has relied on inadmissible evidence in support of his motion.

First, the court notes that while a rear-end collision with a stopped vehicle may create a prima facie case of negligence, there is no support that this holds true where the plaintiff's vehicle was moving at the time of the collision (*Argiro v Norfolk Contr. Carrier, Inc.*, 275 AD2d 384, 385 [2d Dept 2000]; see also, *Hanak v Jani*, 265 AD2d 453 [2d Dept 1999]; *Power v Hupart*, 260 AD2d 458

[2d Dept 1999]; *Hurley v Izzo*, 248 AD2d 674, 675-676 [2d Dept 1998]). In the present matter, the evidence offered by plaintiff includes a police accident report and an affidavit from plaintiff, both of which indicate that plaintiff's vehicle was moving at the time of the collision.

It has also been held that "even where there is evidence that another driver involved in [a motor vehicle] accident was negligent as a matter of law due to a violation of the Vehicle and Traffic Law, a plaintiff moving for summary judgment has the burden of establishing freedom from comparative fault (*Pena v Spade*, 145 AD3d 791, 792 [2d Dept 2016]; *Phillip v D&D Carting Co., Inc.*, 136 AD3d 18, 22 [2d Dept 2015]; *Matos v Tai*, 124 AD3d 848 [2d Dept 2015]). Here, the proof submitted by plaintiff makes no such showing.

In addition, "[i]t is well established that police accident reports are admissible as business records so long as the report is made based upon the officer's personal observations and while carrying out their police duties" (*Holliday v. Hudson Armored Car & Courier Serv.*, 301AD2d 392 [1<sup>st</sup> Dept 2003], citing *Yeargans v Yeargans*, 24 AD2d 280, 282 [1<sup>st</sup> Dept 1965]; see also *Mooney v Osowiecky*, 235 A.D.2d 603, 604 [3d Dept 1997]). Conversely, police reports have consistently been held inadmissible where the information contained in the report "... came from witnesses not engaged in police business in the course of which the memorandum was made" (*Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d at 392, citing *Johnson v Lutz*, 226 App Div 772, 234 NYS 328 [2d Dept 1929], affd 253 NY 124). Here, plaintiff submitted a police accident report dated June 29, 2016 as evidence of Defendant Gallucci's negligence. However, the report was prepared using information submitted by the plaintiff, as the collision was not actually witnessed by the reporting officer while he was carrying out his police duties.

In support of his motion for summary judgment, plaintiff further submitted a certificate of disposition dated December 19, 2017 from the Ramapo Justice Court regarding Gallucci's trial for a violation of Vehicle and Traffic Law §1128(a). According to the document, Gallucci was fined \$150.00 for violating Vehicle and Traffic Law §1128(a). Courts have held that a conviction of a traffic infraction after a not guilty plea is inadmissible against a defendant in a civil suit arising out of the same occurrence. Inclusion of proof of a defendant's conviction for a traffic infraction or violation as evidence in chief to establish some element of a claim of negligence in a civil action has

been regarded as likely to impair the right of a defendant to a fair trial on the issue of civil negligence (*Walther v News Syndicate Co.*, 276 AD 169, 175 [1st Dept 1949]; *see also Augustine v Interlaken*, 68 AD2d 705, 711 [4th Dept 1979]; *Cannon v Weissberg*, 22 Misc 2d 866 [Sup Ct. Queens County 1959]).

In light of the foregoing, the plaintiff's motion for summary judgment is denied. Defendants have come forward with sufficient evidence in admissible form to create issues of fact warranting a trial of this action.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that plaintiff, Curtis Ezell's motion for summary judgment is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants with notice of entry within 10 days of entry.

The parties are hereby advised that a **conference** will be held on **June 10, 2020 at 9:30 am**

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The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
May 4, 2020

  
HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF